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## **New Jersey's Civil Union Law: A Constitutional "Equal" Creates Inequality**

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THOMAS HOFF PROL

## New Jersey's Civil Unions Law: A Constitutional "Equal" Creates Inequality

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## I. INTRODUCTION

While New Jersey law provides gay men and lesbians with benefits, rights, and responsibilities deriving from their relationship status, many states have enacted laws and constitutional amendments that preclude even cursory legal acknowledgement of their status. This patchwork of state laws has caused confusion and frustration in the lesbian and gay community over the recognition of same-sex relationships throughout the United States. As a result, gay men and lesbians may find themselves in a state of “un-wed,” or of partial benefits and rights, depending on the state in which they happen to stop to rest.

In October 2006, the New Jersey Supreme Court disappointed many with its decision in *Lewis v. Harris*.<sup>1</sup> The court held that gay men and lesbians are constitutionally entitled to benefits and rights equal to those of married couples under the laws of New Jersey, but stopped short of requiring the legislature to include gay and lesbian relationships within the state’s civil marriage laws.<sup>2</sup> Instead, the court empowered the legislature to create a parallel statutory structure to provide separate marital benefits to same-sex couples.<sup>3</sup>

The *Lewis* decision came on the heels of *Hernandez v. Robles*, in which New York’s highest court held that “the New York Constitution does not compel recognition of marriages between members of the same sex.”<sup>4</sup> In contrast to New York, New Jersey has long been a leader in protecting the legal rights of gay men and lesbians, as exemplified by its landmark 1992 amendment of the New Jersey Law Against Discrimination.<sup>5</sup> Nonetheless, the *Lewis* decision remains troublesome, because it announces approval of separate but so-called equal treatment of gay and lesbian couples.

In this article, I will provide a brief overview of the recognition of same-sex relationships outside of New Jersey. I will then present a discussion of New Jersey’s winding journey toward full equality in the recognition of same-sex relationships, a journey that is likely not that far from complete. Finally, I will argue that the differing state laws will cause problems and lead to legal challenges as the United States develops a disjointed approach to the recognition of same-sex relationships.

## II. AN OVERVIEW OF THE RECOGNITION OF SAME-SEX RELATIONSHIPS

Currently, forty-one states bar same-sex marriage through statutes and constitutional amendments designed to mirror the federal ban on the recognition of

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1. 908 A.2d 196 (N.J. 2006).

2. *Id.* at 224.

3. *Id.* The legislature chose to amend the existing marriage laws to create a separate statutory scheme. *See* N.J. STAT. ANN. § 37:1-31 (West 2007).

4. 7 N.Y.3d 338, 356 (2006).

5. New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5 (West 2007).

same-sex marriage.<sup>6</sup> Other states and some countries have chosen to define same-sex relationships with a variety of different statutory constructs. Depending on the specific legislative creation, each relationship category provides varying bundles of rights and responsibilities to those who enter into them. Defined relationship categories include civil marriage, civil unions, civil solidarity pacts, civil partnerships, registered partnerships, reciprocal beneficiary relationships, and domestic partnerships.

Massachusetts is currently the only state to provide full marriage equality for same-sex relationships through the provision of actual marriage rights.<sup>7</sup> Vermont<sup>8</sup> and Connecticut<sup>9</sup> provide for civil unions, and Connecticut is the first state to enact such a law without court order.

Hawaii grants citizens reciprocal beneficiary relationships, which provide only a handful of marriage-like rights, while Alaska, California, Maine, Maryland, and the District of Columbia provide for domestic partnerships of varying intensity of recognition and benefits.<sup>10</sup>

Some states, while not specifically allowing for the creation of legally recognized same-sex relationships within their own jurisdictions, will nonetheless recognize relationships validly formed in other jurisdictions under the common law principle of comity.<sup>11</sup> New York, Connecticut, and Rhode Island are examples of states that may recognize same-sex couples who are legally married in other jurisdictions.

In a March 3, 2004 advisory opinion, Attorney General Elliot Spitzer noted that while the New York Domestic Relations Law does not authorize the creation of same-sex marriages, "[t]he exclusion of same-sex couples from . . . marriage . . . presents serious constitutional concerns" under the New York State Constitution.<sup>12</sup> As one commentator argues, "there has never been a New York statute or constitutional provision that expressly *prohibits* the state from sanctioning the

6. See National Conference of State Legislatures, <http://www.ncsl.org/programs/cyf/samesex.htm#doma> (last visited Oct. 5, 2007); see also *infra* note 25.

7. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The Supreme Judicial Court of Massachusetts ruled four-to-three that the denial of marriage licenses to same-sex couples violated the Massachusetts Constitution and ordered the extension of full equal marriage rights to gay men and lesbians. *Id.* at 969–70; see also Opinion of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (citing *Goodridge*, 798 N.E.2d. 941).

8. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

9. S. 963, 2005 Gen. Assem., Reg. Sess. (Ct. 2005).

10. See generally Human Rights Campaign, [http://www.hrc.org/your\\_community/index.htm](http://www.hrc.org/your_community/index.htm) (last visited Oct. 5, 2007) (providing a current overview of rights accorded to same-sex couples on a state-by-state basis). California's domestic partnership law is nearly equal to civil marriage. CAL. FAM. CODE § 297.5 (West 2007).

11. "Comity" is defined as "[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive and judicial acts." BLACK'S LAW DICTIONARY 284 (8th ed. 2004).

12. 2004 N.Y. Op. Att'y Gen. 7 (2004).

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creation of same-sex marriages or from recognizing such marriages created in other jurisdictions."<sup>13</sup> Attorney General Spitzer opined that parties to foreign same-sex marriages therefore "must be treated as spouses" under New York law.<sup>14</sup> His opinion and analysis has been embraced by the current New York attorney general, Andrew Cuomo.<sup>15</sup>

On May 17, 2004, predating the enactment of the Connecticut civil unions law, Attorney General Richard Blumenthal wrote a widely publicized letter to the Massachusetts governor, Mitt Romney, stating that "same-sex marriages performed in Massachusetts are not 'automatically void' in his state 'because our state has no statute declaring same-sex marriage void.'"<sup>16</sup>

On May 17, 2004, Attorney General Patrick C. Lynch of Rhode Island "said his state would probably honor 'any marriage validly performed in another state,' and noted that 'the only marriages in Rhode Island deemed void involve bigamy, incest, or mental incompetence, or marriages in which one or both parties never intended to be married.'"<sup>17</sup> On February 21, 2007, Attorney General Lynch reiterated his 2004 pronouncement that Massachusetts marriages would be given full legal effect in Rhode Island.<sup>18</sup> He advised the state's Board of Governors for Higher Education that it should treat those employees who marry their

13. Derek B. Dorn, *Same-Sex Marriage Under New York Law: Advising Clients in a State of Uncertainty*, 78 N.Y. St. B.J. 40, 42 (2006). After the New York Court of Appeals decided *Hernandez v. Robles*, a conflict developed in the lower courts regarding whether New York would recognize out-of-state same-sex marriages. Compare *Funderburke v. N.Y. Dep't of Civil Serv.*, 822 N.Y.S.2d 393 (Sup. Ct. Nassau County 2006) (refusing to recognize a same-sex marriage performed in Canada, stating that "[w]hile the Court of Appeals in [*Hernandez*] did not directly address the issue of whether New York should recognize same-sex marriages performed in foreign jurisdictions, the Court's ruling is instructive on the definition of marriage. The Court of Appeals held that there are rational grounds for limiting the definition of marriage to opposite-sex couples and that any expansion of the traditional definition of marriage should come from the New York State Legislature."), with *Godfrey v. DiNapoli*, No. 5896-06 (Sup. Ct. Albany County Sept. 5, 2007) (holding that recognizing same-sex marriages performed in Canada "is consistent with New York law regarding the recognition of marriages performed elsewhere"), and *Godfrey v. Spano*, 836 N.Y.S.2d 813 (Sup. Ct. West Chester County Mar. 12, 2007) (declining to follow *Funderburke* and stating that "[a]bsent legislation or appellate court ruling that declares same-sex marriages out-of-state void here, though valid there, there is no positive law to interdict recognition of the marriage"). As of the publication of this article, the appellate courts have yet to resolve this conflict.

14. 2004 N.Y. Op. Att'y Gen. 35 (2004).

15. A spokesman for Attorney General Cuomo has said that since 2004, the Attorney General's office has taken the position that "New York law presumptively requires the recognition of marriages validly performed in other jurisdictions." Denise LaVoie, *Judge Rules Marriages Valid for Gay New York Couples Who Wed in Massachusetts Before July 2006*, ASSOCIATED PRESS, May 16, 2007.

16. Raphael Lewis & Stephanie Ebbert, *Wedding Day: R.I., Conn. May Grant Recognition*, BOSTON GLOBE, May 18, 2004, at A1.

17. *Id.*

18. Press Release, R.I. Dep't of the Att'y Gen., AG Lynch Issues Opinion Recognizing Validity of Same-Sex Marriages Lawfully Performed (Feb. 21, 2007), available at <http://www.riag.ri.gov/public/pr.php?ID=844>; see also Leonard Link, [http://newyorklawschool.typepad.com/leonardlink/2007/02/rhode\\_island\\_at.html](http://newyorklawschool.typepad.com/leonardlink/2007/02/rhode_island_at.html) (Feb. 22, 2007).

same-sex partners in Massachusetts as married when they return to their jobs at Rhode Island's public colleges and universities.<sup>19</sup>

To date, six countries in several world regions have legalized same-sex marriage. In North America, Canada legalized same-sex marriage with the approval of the Civil Marriage Act in 2005.<sup>20</sup> In Europe, the Netherlands, Spain, and Belgium enacted laws that allow same-sex couples to enjoy the rights and responsibilities of marriage.<sup>21</sup> In addition, most other European countries have enacted provisions that grant many marriage-like rights to same-sex couples.<sup>22</sup> In the Middle East, Israel followed a High Court ruling and registered its first married gay couple on January 29, 2007.<sup>23</sup> In Africa, the Constitutional Court of South Africa gave the legislature one year to cure the constitutional violation created by denying same-sex couples access to equal marriage rights in December 2005.<sup>24</sup>

Despite the fact that six countries have legalized same-sex marriage, the United States government maintains that it can constitutionally deny equal marriage rights for gay men and lesbians under federal law and extend that same ability to the various states through the Defense of Marriage Act ("DOMA").<sup>25</sup> DOMA provides that "[n]o State . . . shall be required to give effect to any . . . relationship between persons of the same sex that is treated as a marriage under the laws of such other State."<sup>26</sup> Individual states within the United States that authorize same-sex marriage or a similar relationship status for committed same-sex couples face barriers to creating any exportable change because of the limitations created by DOMA. New Jersey is one such state. Although New Jersey has made great advances, the state's gay men and lesbians will never attain full equality while the constitutionality of DOMA remains unquestioned.

### III. NEW JERSEY'S JOURNEY TOWARD RELATIONSHIP EQUALITY

New Jersey has long been at the forefront of providing legal protections for gay men and lesbians. Garden State Equality, New Jersey's leading gay and

19. Press Release, R.I. Dep't of the Att'y Gen., *supra* note 18; see also Leonard Link, *supra* note 18.

20. Civil Marriage Act, 2005 S.C., ch. 33 (Can.).

21. International Gay and Lesbian Association-Europe, [http://www.ilga-europe.org/europe/issues/marriage\\_and\\_partnership/same\\_sex\\_marriage\\_and\\_partnership\\_country\\_by\\_country](http://www.ilga-europe.org/europe/issues/marriage_and_partnership/same_sex_marriage_and_partnership_country_by_country) (last visited Oct. 6, 2007).

22. *Id.*

23. Ruth Eglash, *Jerusalem Recognizes Its First Gay Couple*, JERUSALEM POST, Jan. 30, 2007, at 1.

24. *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) (S. Afr.); see also Arthur S. Leonard, *South Africa Embraces Freedom to Marry*, LESBIAN/GAY LAW NOTES, Dec. 2006, at 225, available at <http://www.nyls.edu/pdfs/ln0612.pdf>.

25. 28 U.S.C. § 1738C (2000). The law is colloquially referred to as "the Denial of Marriage Act by those disposed to the viewpoint that DOMA is inherently unconstitutional." Daniel Weiss & Thomas Prol, *After the Ceremony: New Jersey's Same Sex Relationships Get a Hostile Reception*, N.J. LAW, Apr. 2006, at 16 n.24.

26. 28 U.S.C. § 1738C.

lesbian civil rights organization, commissioned Zogby International to conduct a poll of New Jersey residents on their feelings concerning same-sex relationships as well as gay and lesbian civil rights in February 2006,<sup>27</sup> and again in August 2007.<sup>28</sup> The results of the poll provide evidence of New Jersey voters' feelings on the state's place as a leader in protecting the legal rights of gay men and lesbians.

According to the February 2006 poll, 56 percent of the respondents feel "that gay couples should have the same freedom as heterosexual couples to marry."<sup>29</sup> In the same poll, 77 percent of the state's voters said that the legislature has more important priorities than to spend time trying to put a constitutional amendment on the ballot to ban gay marriage, with 60 percent of the respondents saying that they hold that view strongly.<sup>30</sup> In the August 2007 poll, the number of the respondents who articulated agreement with marriage equality for same-sex couples rose to nearly 63 percent.<sup>31</sup>

The poll numbers are of little surprise to those familiar with New Jersey law and policy. New Jersey has long stood out as a progressive leader on social issues that have otherwise divided the rest of the nation. Since 1992, the New Jersey Law Against Discrimination has made it unlawful to subject people in the state to differential treatment in employment, housing, places of public accommodation, credit, and business contracts based on various factors, including "affectional or sexual orientation."<sup>32</sup> In 2006, the law was amended to include "gender identity and expression."<sup>33</sup> This change was promptly signed into law by Governor Jon Corzine.

In enacting the Law Against Discrimination, the New Jersey Legislature sought to eliminate discrimination against protected people, finding:

that practices of discrimination against any of its inhabitants [in the enumerated classes] . . . are matters of concern to the government of the State, and that such discrimination threatens not only the rights and

27. ZOGBY INTERNATIONAL, A POLL OF NEW JERSEY VOTERS (2006), *available at* <http://gardenstateequality.org/Final%20Report%202-10-06.pdf>. Zogby International performed the poll from February 8, 2006 to February 10, 2006 among a sample of 802 likely New Jersey voters with a margin of error of  $\pm 3.5$  percent. *Id.* at 2.

28. ZOGBY INTERNATIONAL, POLL OF NEW JERSEY LIKELY VOTERS (2007), *available at* <http://www.gardenstateequality.org/wf-Garden%20State%20Equality.pdf>.

29. ZOGBY INTERNATIONAL, *supra* note 27, at 5.

30. *Id.*

31. ZOGBY INTERNATIONAL, *supra* note 28, at 7. Sixty-two and one-half percent of poll respondents, likely New Jersey voters, stated that "[i]f public officials came to the conclusion that civil unions for gay couples have not worked to provide equality under the law," they would "be fine" with an upgrade of the law to marriage equality for same-sex couples. *Id.*

32. N.J. STAT. ANN. § 10:5-3 (West 2007).

33. *Id.*



proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State.<sup>34</sup>

The legislature then empowered the Division on Civil Rights with the authority to prevent, investigate, and act on issues of discrimination.<sup>35</sup>

On January 12, 2004, with much fanfare, Governor James McGreevey signed the New Jersey Domestic Partnership Act into law.<sup>36</sup> The Domestic Partnership Act was a legislative reaction to a judicial prompt of Judge Linda R. Feinberg in her unpublished trial court opinion in *Lewis v. Harris*.<sup>37</sup>

The New Jersey Legislature's public policy findings in the Domestic Partnership Act were powerful and significant. The legislature stated:

There are a significant number of individuals in this State who choose to live together in *important personal, emotional and economic committed relationships* with another individual . . . [t]hese *familial relationships*, which are known as domestic partnerships, *assist the State* by their establishment of a private network of support for . . . their participants.<sup>38</sup>

The legislature found that "[a]ll persons in domestic partnerships should be entitled to certain rights and benefits that are accorded to married couples under the laws of New Jersey."<sup>39</sup>

The legislature's words notwithstanding, the legal effect of the Domestic Partnership Act fell well short of providing full marriage-like rights and benefits to same-sex couples and their families. Upon enactment, the Domestic Partnership Act provided a handful of legal benefits—eight to be exact, as compared to the more than one thousand provided to married couples—to gay and lesbian couples as well as unmarried heterosexual persons over the age of sixty-two years who file an affidavit of domestic partnership.<sup>40</sup> The Domestic Partnership Act also contains language to provide reciprocity in recognition of extra-state same-sex relationships: "[a] domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the partnership was created, shall be valid in this State."<sup>41</sup>

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34. *Id.*

35. Law Against Discrimination, N.J. STAT. ANN. § 10:5-6 (West 2007).

36. Domestic Partnership Act, N.J. STAT. ANN. § 26:8A-1 (West 2007).

37. *Lewis v. Harris*, No. MER-L-15-03 (N.J. Super. Ct. Nov. 5, 2003).

38. Domestic Partnership Act, N.J. STAT. ANN. § 26:8A-2(a)-(b) (West 2007) (emphasis added).

39. *Id.* § 26:8A-2(d).

40. See *id.* § 26:8A-4; see also Letter from Dayna K. Shah, Associate General Counsel, U.S. General Accounting Office, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf> (acknowledging 1138 federal statutory provisions in which marital status is a factor in determining or receiving benefits, rights, and privileges).

41. N.J. STAT. ANN. § 26:8A-6(c).



Set against this arguably favorable legislative treatment of gay men and lesbians, and same-sex relationships overall, New Jersey's gay and lesbian citizens were left to piece together a patchwork of rights, protections, and benefits conferred by statutory amendments<sup>42</sup> and legal decisions to broaden the rights granted to domestic partners. These civil rights expansions include the ability to bring a loss of consortium claim,<sup>43</sup> entitlement to the disabled veteran's property tax credit,<sup>44</sup> and the right to adopt.<sup>45</sup>

In *Lewis v. Harris*, the New Jersey Supreme Court's landmark decision addressing committed relationship recognition for same-sex couples and their families, seven couples filed suit against the state after each was denied a marriage license.<sup>46</sup> The plaintiffs challenged the constitutionality of New Jersey's marriage laws.<sup>47</sup> Specifically, the plaintiffs argued that same-sex couples have a fundamental right to marry and that the equal protection guarantee requires that same-sex couples be given the legal benefits and privileges of marriage.<sup>48</sup> Each of the couples had been in committed relationships for at least ten years and several of the couples had children and grandchildren; the court noted that the "plaintiffs lead lives that are remarkably similar to those of opposite-sex couples" and that "[t]he seeming ordinariness of plaintiffs' lives is belied by the social indignities and economic difficulties that they daily face due to the inferior legal standing of their relationships."<sup>49</sup>

On October 25, 2006, the New Jersey Supreme Court ruled unanimously<sup>50</sup> in favor of the plaintiffs, holding:

With this State's legislative and judicial commitment to eradicating sexual orientation discrimination as our backdrop, we now hold deny-

42. See, e.g., Gen. Assem. 3429, 211th Leg. (N.J. 2004) (providing that a surviving domestic partner shall have the same intestacy rights as a surviving spouse); Gen. Assem. 1922, 211th Leg. (N.J. 2005) (amending the state guardianship laws); S. 2518, 211th Leg. (N.J. 2005) (including domestic partners as "family members" under the New Jersey Family Leave Act); S. 2520, 211th Leg. (N.J. 2005) (requiring judges in divorce and in termination of domestic partnership actions to inquire whether parties want to change or revoke advance directive).

43. *Buell v. Clara Maass*, No. L-5144-03 (N.J. Super. Ct. May 11, 2005) (holding that domestic partners may maintain a civil loss of consortium claim for the tenure of their legally registered domestic partnership).

44. *Hennefeld v. Township of Montclair*, 22 N.J. Tax 166, 202 (N.J. Tax Ct. 2005) (holding, with little objection from the municipality and none from the Attorney General, that a disabled veteran domestic partner is entitled to property tax relief).

45. *In re Parentage of Robinson*, 890 A.2d 1036, 1040 (N.J. Super. Ct. Ch. Div. 2005).

46. *Lewis v. Harris*, 908 A.2d 196, 200-01 (N.J. 2006).

47. *Id.* at 205.

48. *Id.*

49. *Id.* at 200-02.

50. The ruling for equal treatment of same-sex relationships was seven-to-zero, although three justices, including Chief Justice Deborah Poritz, dissented in part from the majority opinion, stating that only marriage, and not civil unions, would provide for full equality. *Id.* at 224-27 (Poritz, C.J., dissenting).

ing rights and benefits to committed same-sex couples . . . violates the equal protection guarantee of Article I, Paragraph 1 [of the New Jersey Constitution]. . . . [C]ommitted same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.<sup>51</sup>

The court stated that the New Jersey Constitution is to be interpreted to “embrace [the] fundamental guarantee” of equal protection,<sup>52</sup> however, a simple majority of the court side-stepped the imposition of a firm remedy, stating that:

[T]he Legislature must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples. We will not presume that a separate statutory scheme, which uses a title other than marriage, contravenes equal protection principles, so long as the rights and benefits of civil marriage are made equally available to same-sex couples.<sup>53</sup>

The glaring inequity in the court’s “parallel statutory structure” and “separate statutory scheme”<sup>54</sup> is reflective of the great number of holdings of various decisions where separate regulatory and statutory schemes are analyzed vis-à-vis various classes or categorizations of persons. One obvious example that was widely discussed following the *Lewis* decision is *Brown v. Board of Education*, in which the U.S. Supreme Court held that “[s]eparate educational facilities are inherently unequal.”<sup>55</sup>

Nobody has provided a better analysis and critique of the New Jersey Supreme Court’s decision in *Lewis* than its own Chief Justice Deborah Poritz. The Chief Justice, dissenting in part, stated that there is “no principled basis”<sup>56</sup> on which the majority can deny “marriage” to same-sex couples:

What we “name” things matters, language matters.

. . . .  
. . . By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant

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51. *Id.* at 200, 221.

52. *Id.* at 211.

53. *Id.* at 200.

54. *Id.*

55. 347 U.S. 483, 495 (1954); see also David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When it Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL’Y REV. 73 (2005) (discussing civil unions as a form of discrimination perpetuated by the government).

56. *Lewis*, 908 A.2d at 224 (Poritz, C.J., dissenting.).

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as "real" marriage, that such lesser relationships cannot have the name of marriage.<sup>57</sup>

As a result of the *Lewis* decision and the directive from the New Jersey Supreme Court, on November 20, 2006, Assemblyman Reed Gusciora introduced the four-page Civil Marriage and Religious Protection Act in order to eliminate "discriminatory exclusion of certain couples from marriage."<sup>58</sup> The bill failed to gain additional support and was not accompanied by a companion bill in the Senate.

Weeks later, the New Jersey Legislature considered a civil unions law and passed comparable bills in each house that attempted to provide the full and equal rights, benefits, and obligations that marriage provides under state law. The forty-seven-page New Jersey Civil Unions Act was signed by Governor Jon Corzine on December 21, 2006, and became law sixty days thereafter on February 19, 2007.<sup>59</sup> The law provides, "[c]ivil union couples shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage."<sup>60</sup> While the language of the Act purports to mandate equality, it is unable to deliver on the *Lewis* promise of full equality. The civil unions law does not create rights or standing to claim rights provided to spouses or married couples under federal law and the laws of other states because of the current status of DOMA. Poignantly, the law fails to provide committed same-sex couples and their families with the word "marriage," a word that resonates to everyday citizens and connotes the simple promise of "forever and ever." In doing so, the law provides a hollow sense of a legal equality that, by virtue of its alternate designation, authorizes institutions and businesses to follow the government's example of treating same-sex families and relationships differently. This so-called legal equality manifests in everyday life as something that is not considered to be marriage to the state's residents, thereby withholding dignity and actual reality from these relationships.

As Chief Justice Poritz emphasized in her dissenting opinion in *Lewis*, the word "marriage" has meaning.<sup>61</sup> State-sanctioned marriage provides a great number of automatic rights and protections for those who enter into them, including those that strike at the heart of family formation. The word "marriage" provides an equally important set of rights and benefits to couples on the federal level—rights and benefits that are denied to domestic partners or parties to civil unions. Marriage recognition, whether on the state or the federal level, impacts

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57. *Id.* at 226 (Poritz, C.J., dissenting).

58. Gen. Assem. 3865, 212th Leg. (N.J. 2006).

59. See N.J. STAT. ANN. § 37:1-31 (West 2007).

60. *Id.* § 37:1-31(a).

61. *Lewis*, 908 A.2d at 224-31 (Poritz, C.J., dissenting).

property rights, immigration status, visitation rights, estate planning, access to health benefits, the ability to adopt children, tax benefits, and numerous other rights and benefits that marriage automatically provides to heterosexual couples. It is, therefore, disappointing that New Jersey has failed to fulfill the promise of *Lewis* by refusing to grant the equal right to marry to all of its citizens.

#### IV. THE NEW JERSEY CIVIL UNIONS ACT: ALREADY UNEQUAL

The public policy pronouncement in the New Jersey Civil Unions Act provides that “eliminating obstacles and hardships” faced by same-sex couples is a “necessary and proper” function of government and a purpose of the law.<sup>62</sup> This pronouncement is more significant for what it does not say rather than for what it does say. In *Lewis*, the New Jersey Supreme Court indicated the need for the state legislature to articulate a basis for its selection of civil unions over marriage in providing gay men and lesbians with benefits, rights, and responsibilities deriving from their relationship status:

If the Legislature creates a separate statutory structure for same-sex couples by a name other than marriage, it probably will state its purpose and reasons for enacting such legislation. . . .

. . . Although we do not know whether the Legislature will choose the option of a civil union statute, the dissenters presume in advance that our legislators cannot give any reason to justify retaining the definition of marriage solely for opposite sex couples.<sup>63</sup>

The *Lewis* dissenters’ presumption was and is right. The state legislature failed in wholesale fashion to articulate any basis, let alone a rational basis, for the continued exclusion of committed same-sex couples from the definition of marriage. This failure is significant, not only because the New Jersey Supreme Court appears to have called for the public policy pronouncement, but also because it leaves the law with a fundamental flaw and suggests that there is no basis, in law or in fact, for maintaining exclusionary marriage laws. It also represents a rush to get something done by cobbling together some statute, any statute, to provide the least that the *Lewis* court mandated with minimal deliberation and planning. Likewise, the legislature’s failure to include committed same-sex couples in the definition of marriage suggests that other significant errors and oversights lurk, hidden within the law like a rotten Easter egg or a poisonous truffle. This careless approach to legislative craftsmanship is even more troubling when one considers that the law impacts the lives of so many in a most personal and fundamental way.

Only a short time elapsed before the New Jersey Legislature exhibited a clear failure to abide by the spirit, letter, and intent of the *Lewis* holding and

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62. N.J. STAT. ANN. § 37:1-28 (West 2007).

63. *Lewis*, 908 A.2d at 222.

promise of full equality for same-sex couples. Within three weeks after it enacted the civil unions law, the legislature presented Governor Jon Corzine with an amendment to the state's divorce statute, providing for irreconcilable differences as a basis for divorce under New Jersey law.<sup>64</sup> Conspicuously absent from the bill was inclusion of the newly enacted civil unions category of relationships. This exclusion left practitioners wondering if the legislature intended to exclude civil union terminations from this basis or if the legislature understood the bootstrapping language of the civil unions law, coupled with the *Lewis* holding, to extend the irreconcilable differences basis to the termination of civil unions. Either way, it is apparent that attorneys may have to engage in expensive motion practice to argue for an irreconcilable differences termination of a civil union under New Jersey law. This turn of events provides another poignant example of *Brown's* admonition concerning the inherent inequality of separate structures.<sup>65</sup>

## V. CONCLUSION

President Clinton signed DOMA into law on September 21, 1996.<sup>66</sup> The federal law became a catalyst for legislatures in forty-one states to enact "mini-DOMAs" as legislation or constitutional amendments.<sup>67</sup> An obvious concern for states that recognize same-sex civil unions, civil solidarity pacts, civil partnerships, registered partnerships, reciprocal beneficiary relationships, or domestic partnerships is that state and federal DOMAs leave same-sex couples in the uncertain state of "un-wed" whenever they travel from one state or country to the next. The implications of these state and federal DOMA laws will affect all aspects of day-to-day living for gay and lesbian families. In addition, despite Chief Justice Poritz's sage observation that the name "marriage" matters, the federal DOMA ensures that even with full and equal access to a state's marriage laws, lesbian and gay couples may not be treated equally under the federal laws of the United States.

The effect of state and federal DOMA laws as well as the different forms of recognition—and the varying bundles of rights and responsibilities that accompany each—will continue to engender confusion and inequality. The number of rights in each bundle and the amount of recognition provided within each jurisdiction invokes considerations that strike at the heart of our national union and international relations. These considerations include disputes arising under na-

64. N.J. STAT. ANN. § 2A:34-2 (West 2007). The statute now provides that spouses seeking a divorce may attest that they are filing for divorce arising from "[i]rreconcilable differences which have caused the breakdown of the marriage for a period of six months and which make it appear that the marriage should be dissolved and that there is no reasonable prospect of reconciliation." *Id.*

65. See *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

66. Defense of Marriage Act, 28 U.S.C. § 1738C (2000).

67. See National Conference of State Legislatures, <http://www.ncsl.org/programs/cyf/samesex.htm> (last visited Oct. 7, 2007).

tional and state constitutions and the common law principle of comity, which requires that the United States show deference to the laws of other countries.<sup>68</sup>

The patchwork of formal domestic and international recognition of same-sex relationships will likely have dramatic implications under federal laws. This is especially true for U.S. immigration policies, because many immigration policies are strongly linked to relationship status. In considering recognition of relationships formed outside of the United States, it is interesting to note that the State Department has stated that international same-sex marriages of other nations shall be treated as marriages for non-immigrant travel purposes. Specifically, the State Department provides that if "the relationship is recognized under law as being fully equivalent in all respects to a traditional legal marriage and grants the parties all the same rights and duties as a traditional marriage," then the partners may be permitted to enter the United States.<sup>69</sup> The State Department further provides, "[t]his is true for both opposite and same-sex partners."<sup>70</sup>

Under the New Jersey legislature's enactment of the civil unions law, another important barrier to equality exists with respect to employee benefits plans. Employers' health benefits plans that are not administered through a contract for insurance under New Jersey law—those that are self-funded—are regulated by the Employee Retirement Income Security Act ("ERISA").<sup>71</sup> ERISA governs health plans for approximately 66 percent of insured people in New Jersey.<sup>72</sup> Plan sponsors must design and administer their plans in accordance with ERISA,<sup>73</sup> a federal statute that preempts any state regulatory scheme affecting benefits plans.

A dichotomy exists between same-sex civil union partners and their "equal" married counterparts under ERISA-governed plans, because these plans are necessarily impacted by DOMA, resulting in the possible preemption of a Law Against Discrimination claim brought by employees to enforce the partner's equal access to benefits under New Jersey state law. With the federal ERISA statute operating subject to DOMA's definition of marriage, and with federal preemption likely precluding a claim of sexual orientation-based discrimination under the state's Law Against Discrimination, employers are not mandated to confer benefits upon same-sex married couples or parties to a New Jersey civil union. The distinction is, however, that an employer who denies such benefits to a same-

68. For example, according to the doctrine of comity, a valid marriage in Spain (same-sex or otherwise) should be recognized in the United States.

69. Memorandum from Colin Powell, Sec'y of State, to All Diplomatic and Consular Posts (July 2001), *available at* [http://travel.state.gov/visa/laws/telegrams/telegrams\\_1414.html](http://travel.state.gov/visa/laws/telegrams/telegrams_1414.html).

70. *Id.*

71. See Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1003 (2000).

72. E-mail from Christine A. Stearns, Vice President, Health & Legal Affairs, N.J. Bus. & Indus. Ass'n, to Thomas Hoff Prol, Scarinci & Hollenbeck, LLC (Sept. 26, 2007, 11:22 EST) (on file with author).

73. See Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001(c) (2000).



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sex married couple must identify that its denial is based on the sex of the spouses while the employers in states with civil unions who deny such benefits merely need to state that federal law and/or collective bargaining agreements do not authorize recognition of civil unions. This distinction has resulted in great differences in the problems experienced by same-sex couples married in Massachusetts, for example, versus those who have undergone a civil union in New Jersey.

The United Parcel Service ("UPS") recently denied spousal benefits to lesbian partners in a New Jersey civil union.<sup>74</sup> The lesbian couple was not part of a marriage relationship and each partner lacked the legal status of having a "spouse." In addition, the union's collective bargaining agreement and ERISA preemption resulted in the rejection of their relationship as being equal to marriage.<sup>75</sup>

UPS regularly provides marital benefits, including healthcare coverage, to spouses of employees who have married their same-sex partners in Massachusetts, which highlights the significant, real-world difference between a civil union and a marriage. Indeed, this distinction epitomizes the oft-banded phrase from *Brown* that "separate . . . facilities are inherently unequal."<sup>76</sup>

The significance of the words "marriage" and "spouse" are apparent to lawyers and non-lawyers alike. Despite New Jersey's civil unions law being drafted to mirror marriage, it has shown itself to provide something short of marriage equality, something akin to marriage-lite. As New Jersey State Bar Association President Lynn Fontaine Newsome has stated, "civil unions are a failed experiment in discrimination."<sup>77</sup> Time will tell if the New Jersey Legislature corrects this blemish on the state's history of leadership on civil rights.

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74. See Letter from Jon S. Corzine, Governor, State of N.J., to Michael L. Eskew, Chairman and Chief Executive Officer, United Parcel Serv. of Am. (July 20, 2007) (on file with author). Governor Corzine made a personal appeal to UPS to override its legal ability to avoid a provision of benefits to the couple. *Id.* UPS agreed to the governor's request in the face of a tirade of negative press on the issue. See Jennifer Moroz, *N.J. Civil Unions, Six Months On*, PHILA. INQUIRER, Aug. 5, 2007, at A1.

75. See Letter from John S. Corzine, *supra* note 74.

76. *Brown*, 347 U.S. at 495.

77. See *Same-Sex Marriage; State Bar Reaffirms Support*, N.J. LAW, Oct. 1, 2007, at 2.